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Voorhees of Chicago, Treasurer. Mr. Thomas W. Davis of Wilmington continues as a member of the Executive Committee, having been elected last year for a three-year term. An invitation was extended to the Executive Committee to hold its winter meeting in Asheville next February.

The North Carolina delegation chose the following officers: T. C. Guthrie, Sr., of Charlotte, Vice-President for North Carolina; Alexander B. Andrews of Raleigh, member of General Council for North Carolina; and T. S. Rollins of Asheville, Henry E. Faison of Clinton, Kenneth C. Royall of Goldsboro, and Henry M. London of Raleigh, members of the Local Council.

In addition to the above, the following members of the North Carolina Bar attended the meeting: J. Crawford Biggs, Raleigh; J. H. Bridgers, Henderson; Thomas W. Davis, Wilmington; Lincoln L. Kellogg, Asheville; Charles T. McCormick, Chapel Hill; W. T. Morgan, Marion; K. Van Winkle, Asheville; R. M. Wells, Asheville; Vonno L. Gudger, Asheville.

At a recent meeting of the Executive Committee of the North Carolina Bar Association it was decided to hold the next annual meeting of the Association at Pinehurst, North Carolina, on May 1, 2 and 3, 1930. At that meeting addresses will be made by Hon. Wm. D. Mitchell, Attorney-General of the United States, Governor O. Max Gardner and Hon. Henry Upson Sims, President of the American Bar Association. Hon. Kenneth C. Royall, of Goldsboro, was elected to fill out the unexpired term of President T. L. Caudle whose untimely death occurred September 4, 1929.

NOTES

PAYMENT TO ONE JOINT PAYEE

Dawson & White v. Nat'l. Bank of Greenville, 197 N. C. 499, 150 S. E. 38 (1929), was an "action by the payees to recover of the drawee bank the amount of a check, payable to their order," which the drawee-defendant is alleged to have paid, without indorsement, to some unauthorized person, not the plaintiffs. The court viewing this erroneous payment as equivalent to a certification of the check, allowed plaintiffs to recover. It is believed that no useful purpose is served by treating payment to one not a lawful holder¹ as an accept-

¹The check is said by the statement of facts to have been "presented for payment by a holder, without the indorsement of the payees." (Italics ours).

ance of the check in favor of the rightful owner and, as observed in a previous comment,² many leading authorities condemn that view.

But the present appeal presents an additional issue of importance which will be considered briefly herein.

"Defendants offered evidence which they insist tended to show that the amount of the check was paid to one of the payees." The evidence was excluded at trial and this ruling was upheld. If the plaintiffs had been partners, as the title of the case suggests,³ it would certainly have been in order for either partner to have received payment as agent for the firm, and the evidence offered would then have been proper.⁴ If, as the record shows, they were not partners, they were evidently joint payees⁵ and the question of whether payment to one discharges the debt is not so easily answered. At common law one of two joint creditors could receive payment on an obligation and give a discharge therefor.⁶ Proceeding on that theory a few

The word "holder" is here used in a non-technical sense, for unless the person mentioned was one of the payees or an indorsee he would not be a holder. N. I. L. §191, Cons. Stat. N. C. 2976.

²7 N. C. L. REV. 191 (1929).

³"Larry Dawson and D. G. White, trading as Dawson and White, v. Nat'l. Bank of Greenville." The record on appeal (Vol. 5, fall term, 1928) shows that the plaintiffs were a landlord and tenant disposing of a crop jointly owned.

⁴Each partner has implied power to collect debts due the firm. Mechem, Elements of Partnership (2 ed.), §260; Gilmore, Partnership, §102. See Black Mountain R. R. v. Ocean Acc. and Guar. Co., 175 N. C. 566, 96 S. E. 25 (1918).

⁵N. I. L. §8 (4), N. C. Cons. Stat. Ann. (1919) §2989 (4). But not joint tenants in all respects. Adams, J., in Dozier v. Leary, 196 N. C. 12, 144 S. E. 368 (1928) declared joint payees to be tenants in common.

⁶Mangrum's Admrs. v. Sims, 4 N. C. (1 Car. L. Repos. 547) 160 (1814), *semble*, administrators; Richardson v. Jones, 23 N. C. 296 (1840), *semble*: Legrand v. Baker, 6 T. B. Mon. 235 (Ky. 1827); Morrow v. Starke, 4 J. J. Marsh, 367 (Ky. 1838); Jenkins v. Williams, 191 Ky. 165, 229 S. W. 94, 96 (1921), *semble*; People v. Keyser, 28 N. Y. 226, 228 (1863), executors; Bowes v. Seeger, 8 Watts & S. 222 (Pa. 1844), assignees of mortgage in trust; State v. Rose, 71 Tenn. 531, 534 (1879), *semble*; Allen v. So. Penn. Oil Co., 72 W. Va. 155, 77 S. E. 905 (1913); also Harding v. Parshall, 56 Ill. 219, 226 (1870), payment even after notice by other joint obligee not to pay; Jens Marie Oil Co. v. Rixse, 72 Okla. 93, 178 Pac. 658 (1919), payment to wife joint lessor with husband even though title to leased premises was in husband; Bank of Guntersville v. U. S. Fidel. and Guar. Co., 201 Ala. 19, 75 So. 168, 170 (1917), payment of dividends to one joint owner even though others were minors. And see Lyman v. Gedney, 114 Ill. 388, 29 N. E. 282, 286 (1885); Musgrave v. Musgrave, 86 W. Va. 119, 103 S. E. 302, 315 (1920); 22 A. and E. Ency. (2 ed.) 524. But payment to a third party authorized by only one of the joint obligees is not sufficient. Moore v. Bevier, 60 Minn. 240, 62 N. W. 281 (1895). This resembles the rule of N. I. L. §41, since indorsement of a negotiable instrument is commonly for collection. And though one joint obligee may discharge the obligation he may not alone maintain a suit upon it. Richardson v. Jones, *supra*; Fishell v. Evans, 193 N. C. 660, 137 S. E. 865 (1927), promissory note; Hatfield v. Cabell County Ct., 75 W. Va. 595, 84 S. E. 335 (1915); Henry v. Mt. Pleasant Twp., 70 Mo. 500 (1879). Cf. Delano v. Jacoby, *infra* note 7.

decisions have held likewise as to negotiable instruments.⁷ Of course, the common law rule requiring both of two joint payees to indorse in order to pass title,⁸ which was enacted into N. I. L. sec. 41,⁹ does not specifically cover the case since an "indorsement" placed on the instrument in order to obtain payment amounts only to a receipt.¹⁰

But to decide a negotiable instrument question simply by the application of the ordinary rule of contracts is to overlook the very essentials in which the commercial law differs from common law—in this particular type of case, the fact that commercial paper is constantly drawn jointly to two payees for the express purpose of preventing either payee from transferring the instrument or receiving the money without the concurrence of the other.¹¹ Business convenience demands that a drawee who defends by showing payment direct to one of two joint payees should go further and show either the indorsement of the other payee or his authorization of the payment as made. And so, while section 41 concerning indorsements admittedly does not govern the case of a direct payment without intermediate parties,

⁷ Before N. I. L., *Bruce v. Bonney*, 12 Gray 107, 111 (Mass. 1858), that one joint payee in possession of note may either receive payment or indorse; *Wright v. Ware*, 58 Ga. 150, 152 (1877), assigning artificial reason that one joint payee is temporarily agent of the other hence like partner; *Delano v. Jacoby*, 96 Cal. 275, 31 Pac. 290 (1892), *semble*. Since N. I. L. but without reference to it, *Park v. Parker*, 216 Mass. 405, 103 N. E. 936 (1914), payment to survivor; *Ethington v. Rigg*, 173 Ky. 355, 191 S. W. 98 (1917) *semble*, in a case where one of several obligees purported to release a mortgage of record by signing "R, agent Riggs Heirs," he being himself one of them,—proof of his agency essential. Since N. I. L. and referring to §41 but declaring it inapplicable to case of receiving payment. *Dewey v. Metropolitan Life Ins. Co.*, 256 Mass. 281, 152 N. E. 82 (1926).

⁸ *Johnson v. Mangum*, 65 N. C. 146 (1871), overruling without reference dictum in *Sneed v. Mitchell's Extrs.*, 2 N. C. 289, 292 (1796) that "the endorsement by one of two joint payees, is good to transfer the whole contents of the note to an endorser" (sic); "Indorsement by one of several joint payees or indorsees not partners," 38 A. L. R. 801. Cf. *Bruce v. Bonney*, *supra* note 7. And compare special English rule relating to dividend warrants, 2 Halsbury, *Laws of England* 504, note (s).

⁹ N. I. L. §41, N. C. Cons. Stat. Ann. (1919) §3022: "Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse unless the one indorsing has authority to indorse for the others." *Virginia-Carolina Joint Stk. Land Bk. v. First & Citiz. Natl. Bk. of Eliz. City*, 197 N. C. 526, 150 S. E. 34 (1929), drawer v. drawee; *Crahe v. Mercantile T. & S. Bk.*, 295 Ill. 375, 129 N. E. 120, 12 A. L. R. 92 (1920), joint payee v. drawee; *Kaufman v. State Sav. Bk.*, 151 Mich. 65, 114 N. W. 863 (1908), joint payee v. indorsee.

¹⁰ And according to some authorities such indorsement as a receipt may not be required by the drawee as a condition to payment. *Osborn v. Gheen*, 16 D. C. (5 Mack.) 189 (1886). See *Klaus, Identification of Holder and Tender of Receipt on the Counter-Presentation of Checks* (1929) 13 MINN. L. REV. 281.

¹¹ See e.g., *Virginia-Carolina Joint Stock Land Bank v. Liles*, 197 N. C. 413, 149 S. E. 377 (1929).

the commercial policy which gave rise to that section can only be perfectly effected and the utility of instruments drawn to joint payees can only be preserved by a similar policy in both cases.¹²

The instant case is complicated in some of its aspects by the fact that the drawee directed the bank to pay his checks as if drawn to bearer,¹³ but the present issue is not affected by that fact. And though the decision on this issue seems to be wholly unsupported by case authority elsewhere it establishes a desirable precedent.¹⁴

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¹² Indeed, when it is considered that the drawee is discharged if the funds actually come into the hands of the one entitled to them even if he did not indorse at all: *Bell v. Murchison Nat. Bk.*, 196 N. C. 233, 145 S. E. 241 (1928), 7 N. C. L. R. 455, it seems that the provisions of N. I. L. §41 lose all significance except in a case where the person holding under the indorsement of only one joint payee is suing on the instrument. If one joint payee indorsed alone and sold the instrument to a third person who collected the draft the debt would be discharged. This is what happened in *Dewey v. Metropolitan*, *supra* note 7, where the check was "cashed" by one joint payee not at the counter of the drawee but at another bank. The check, therefore, contrary to the provision of §41, which the court said had no application, went through intermediate hands to payment with the genuine indorsement of only one of the joint payees. If the indorsement by one joint payee were for collection only the same result would seem to follow even more certainly—although *quaere* in Minnesota. See *Moore v. Bevier*, *supra* note 6.

¹³ The direction was in writing and was of a sort commonly given to banks in the tobacco markets by tobacco buyers who paid farmers by check. The bank would of course be bound to respect the direction, somewhat as a telegraph company would be bound to pay money without identification when so directed by the transmitter. See *W. U. Tel. Co. v. Wells*, 50 Fla. 474, 39 So. 838 (1905) and language in *Dodge v. Natl. Exch. Bk.*, 20 Ohio St. 234, 5 Am. Rep. 648 (1870); *Davis v. Lenawee Co. Sav. Bk.*, 53 Mich. 163, 18 N. W. 629 (1884); *W. U. Tel. Co. v. Bimetallic Bk.*, 17 Colo. App. 229, 68 Pac. 115 (1902).

If the payee had requested the drawer to so order his bank, it would seem that he should stand the loss as he would if a bearer check had been issued him. But a mere custom for the banks to pay all paper without identification as if drawn to bearer would hardly affect the rights of a payee holding a check drawn in plain terms to order.

As between drawer and drawee, the bank could of course charge against the drawer an item wrongfully paid by his express order. See *Mackay Tel.-Cable Co. v. Ft. Worth Nat'l. Bank.*, 230 S. W. 244 (Tex. Civ. App. 1921). And it would seem that the drawer would be liable also for the further obligation imposed on the bank by the instant case in consequence of the depositor's act.

¹⁴ Professor Life in forcibly advocating this view adds the following: "If the Massachusetts rule be sound, paper payable to two or more payees under N. I. L. §8 (4), becomes, so far as payment is concerned, impliedly payable to 'one or some of the several payees,' under § 8 (5), thus rendering the latter subsection useless." He also calls attention to the fact that before the N. I. L. instruments payable in the alternative were not negotiable while those to joint payees were, as evidence of a wide difference between those two types. *BIGLOW, BILLS, NOTES AND CHECKS*, (3d. ed.) §147 n. 5.